

6/9/08

(14)

MEMORANDUM

TO: STEPHEN D. ANDERSON
FROM: RANEN S. SCHECHNER
RE: ACTON/BOH: RIGHT OF ABUTTING LANDOWNERS TO TIE-IN TO
SEWER UNDER PUBLIC WAY
DATE: 6/01/03

Question

If the Town of Acton permits a property owner situated outside the sewer district to tie into the municipal sewer system by constructing a 1/4 mile long pressure line in the public way, and that line runs in front of homes not currently in the sewer district, are those homes eligible to tie into that line?

Short Answer

Yes. Under G.L. c. 40, § 21(5), the Town determines which sewer lines are “common sewers” to which abutting landowners have the right to connect. Under the Town’s Sewer Use Bylaw and Regulations, sewer lines which travel under public ways are automatically “common sewers.” Accordingly, an abutting landowner has the right to tie-in.

Analysis

The right of a town resident to connect to a common sewer upon request is established by General Laws Chapter 83, § 3, which reads (emphasis added):

The board or officers of a city or town having charge of the repair and maintenance of sewers may, upon request of the owner of land and payment by him of the actual cost thereof, construct a particular sewer from the street line to a house or building. A town may appropriate money for connecting estates within its limits with common sewers, and no estate shall, in any year in which such an appropriation is made, be connected with a common sewer except in the manner hereinafter provided. ... If the board of health of a town making such appropriation shall order land abutting upon a public or private way in which a common sewer has been laid to be connected with such sewer, or if the owner of such land shall make to the board or officer having charge of the maintenance and repair of sewers application to connect his land with a common sewer, such board or officer shall make such connection. (emphasis added)

In other words, if (1) private property abuts a public or private way through which a "common sewer" has been laid, and (2) the land owner requests that the board connect his land with the common sewer, that connection must be made by the Town, provided that there is reasonable sewer capacity to support the added discharge. Fluharty v. Board of Selectmen of Hardwick, 382 Mass. 14, 16 (1980); P & D Service Co., Zoning Board of Appeals of Dedham, 359 Mass. 96, 103 (1971); Clark v. Board of Water and Sewer Commissioners of Norwood, 353 Mass. 708, 710 (1968).

The question, then, becomes when is a sewer line considered a "common sewer"?

The right to establish a common sewer is provided to the Town by G.L. Chapter 40, § 21, which provides that (emphasis added):

Towns may, for the purposes hereinafter named, make such ordinances and by-laws, not repugnant to law, as they may judge most conducive to their welfare, which shall be binding upon all inhabitants thereof and all persons within their limits. ...

...
5) *Establishment of Common Sewers.* - For declaring any sewer or drain laid in any land or way, public or private, opened or proposed to be opened for public travel, to be a common sewer, and that it shall not be laid or connected with any existing common sewer except by the board or officers authorized to lay and maintain common sewers.

(6) *Regulation of the Use of Sewers.* - For regulating, under a penalty not exceeding fifty dollars for each offence, the use of the common sewers and the connections which may be made therewith.

See also G.L. c. 83, § 22 ("If an ordinance or by-law provides that any drain or sewer laid in any land or way, public or private, which is opened or proposed to be opened for public travel and accommodation shall be a main drain or common sewer, and such drain or sewer is laid in a private way or land at the expense of the owner thereto, his land shall not be assessed for such drain or sewer, except for the cost of connecting it with the common drains or sewers already established.").

The Town's "Sewer Assessment Bylaw" (Bylaw, Section D10) provides for the laying out, construction and operation of the Town's sewer system in broad terms, and for the construction of the treatment facility for the Middle Fort Pond Brook Sewer District. It goes into considerably more detail concerning sewer assessments, assessment rates, and user fees. The

Bylaw uses interchangeably the terms “common sewer”¹ and “public sewer”², without defining either.

The Board of Selectmen acting as the Town’s Sewer Commissioners passed "Sewer Use Regulations" on May 7, 2002, governing a wide range of sewer issues, including building sewers, connecting sewers, and the use of public and private sewers. Section 1.B.17 defines a Public Sewer” to mean a “common sewer controlled by the Town of Acton” (second emphasis added). Section 1.E.12 indicates that the Town controls the sewer connection in the public way (emphasis added):

The cost of cleaning, maintaining, repairing or replacing any particular sewer connection shall be paid by the property owners connected to said sewer system, up to the property line in a public way. The Town assumes the liability when located in the public way.

Accordingly, by statute, the Town has the right to establish that sewer lines built in the public way are “common sewers”, and the Town has done so through its Bylaw and Regulations. If the connecting pressure sewer in the present case is laid in the public way, it will be a “common sewer,” and abutting landowners will have a right to tie into the pressure line under General Laws Chapter 83, § 3.³

¹ Section D.10.5 provides that the “Sewer Commissioners may establish reasonable fees pursuant to G.L. c. 83, § 17 to cover costs of construction of common sewers and other facilities required to serve land not previously served by the sewer system and not previously assessed to the owner of such land. Any such fee shall be reduced to the extent the landowner pays such expenses, in accordance with G.L. c. 83, § 22” (emphasis added).

² Section D.10.2.a provides that the “Town, acting through its Sewer Commissioners, shall assess the owners of all land abutting any way in which there is a public sewer line constructed by the Town, by the uniform unit method, as authorized by G.L. c. 83 §15” (emphasis added). Section D.10.3 provides that the “Sewer Commissioners shall establish just and reasonable fees for the use of the public sewer system by the owner of any land, including public land, not liable to assessment, which fee shall be based on the avoided cost of construction of sewage disposal facilities to serve such land” (emphasis added). Section D.10.9 provides that the “Sewer Commissioners may establish rules and regulations concerning the use of the public sewer system, including but not limited to, rules and regulations prohibiting the deposit of any harmful or deleterious substance into the system, for regulating connections to the system and establishing civil penalties for violation of such rules” (emphasis added).

³ This conclusion is distinguishable from Riccio v. Dandreo, 3 Mass. L. Rptr. 420, 420 (Sup. Ct. 1995). In that case, to obtain a building permit to construct their house, the plaintiffs were required, at their own expense, to have the town's sewer main extended 125 feet under a private way to a point near their parcel. Riccio v. Dandreo. Three years later, the defendant purchased a parcel of land further along the same private way. To obtain a building permit, the defendant was required to extend the sewer main (which the plaintiffs had built in the private way) an additional 135 feet. The plaintiffs sued the defendant to prevent the tie-in and the court ruled in their favor. The court held that “until such time as the town may enact an ordinance declaring the sewer and water mains in question to be operated for public use and accommodation, see c. 40 s 21(b) [sic], or the town otherwise accepts the

By allowing the connection of a property outside the sewer district to the public sewer by a 1/4 mile sewer connection laid in the public way, the Town would effectively be enlarging the Sewer District for that length of pipe. Before doing so, the Town should consider the effect on the capacity of the plant and should ensure that the connecting property or properties are subject to and assessed with appropriate sewer betterment and sewer use charges.

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private sewer ... as part of the public systems, defendant may not legally connect thereto without the plaintiff's permission." Dandreo, 3 Mass. L. Rptr. at 420. See also Abbott v. Board of Water and Sewer Commissioners of Hopkinton, 40 Mass. App. Ct. 495, 496 - 497 (holding that a private line must be "accepted or designated as a common sewer" by the Board pursuant to G.L. c. 83, § 1). These private sewers in private ways are distinguishable from a sewer constructed in the public way which the applicable Bylaw and Regulations treat as a common/public sewer.

Steve Ledoux

From: Doug Halley
Sent: Thursday, June 05, 2008 10:26 AM
To: John Murray; Steve Ledoux
Subject: RE: Request for Approval to connect to Sewer System

With the Powdermill expansion the Town wanted ownership because the work was within the Town right of way and multiple users were involved, in particular future users to the pump station. In this case a small portion of the work will be along High Street, the great majority will be in an easement on the Faulkner Mill property. As for additional users Corey's information shows that no one gains a right to access to the sewer with this work so any additional connections would need approval by the Sewer Commissioners. I believe that Mr. Alesbury will have no problem with a condition prohibiting a 40B.

-----Original Message-----

From: John Murray
Sent: Thursday, June 05, 2008 10:16 AM
To: Doug Halley; Steve Ledoux
Subject: RE: Request for Approval to connect to Sewer System

Steve & Doug:

I have spoken to Lauren twice today. She would like a briefing tomorrow morning and in her opinion 4 selectpersons are in favor of the proposal.

My interpretation of outstanding items are:

1. Who will maintaining the pipe in the sidewalk?
2. Is the board able to add conditions such a no 40B?
3. How does it effect others - rights and obligations?

John

From: Doug Halley
Sent: Thursday, June 05, 2008 10:00 AM
To: Steve Ledoux; John Murray
Subject: FW: Request for Approval to connect to Sewer System

Attached is information Corey has found regarding the Alesbury's property and their abutters. The plan attached and the Tax Atlas indicate that only Lot 1 (the Alesbury's lot) has frontage on High Street. All the lots seem to have rights in the easement that services the properties.

-----Original Message-----

From: Corey York
Sent: Thursday, June 05, 2008 9:35 AM
To: Doug Halley
Subject: RE: Request for Approval to connect to Sewer System

Attached are copies of the plan & the deeds that I researched for 20 & 22 High Street. The deed for 20 High Street (Lots 2, 3 & 4 on Plan Book 7098 Page End) states the following:

"Said premises are conveyed together with the buildings thereon and all rights which the grantors have in and to said strip of land left for a street or way and

shown on said plan."

The deed for 22 High Street (Lot 1 on Plan Book 7098 Page End) only includes a standard disclaimer about easements, restrictions and agreements of record.

The deed for 18 High Street (Lot 5 on Plan Book 7098 Page End) does seem to discuss the strip of land for the said street.

There were some earlier references to deeds and Probates of a will for this property that we do not have in our files.

I briefly looked through my street folder for High Street, but I did not find any more info. Hopefully, this info helps.

*Thank You,
Corey York
Acton Engineering Department*

-----Original Message-----

From: Steve Ledoux

Sent: Wednesday, June 04, 2008 2:57 PM

To: Doug Halley

Cc: Corey York; Lauren Rosenzweig

Subject: FW: Request for Approval to connect to Sewer System

Doug

Can you look at the Alesbury situation and determine if his immediate neighbors abut the public way and therefore would be subject to a sewer betterment? It is my recollection from our previous discussion the may not directly abut High St.

The BoS would like to bring closure to his request next Monday night.

Steven L. Ledoux
Town Manager
472 Main St
Acton, MA 01720
Telephone:(978) 264-9612
Fax: (978) 264-9630

When writing or corresponding, please be aware that the Secretary of State has determined that most email is a public record and, therefore, may not be kept confidential.

From: Alesbury, Bill [mailto:bill.alesbury@hp.com]

Sent: Sunday, May 04, 2008 6:55 PM

To: Board of Selectmen

Subject: Request for Approval to connect to Sewer System

A. William & Debra S. Alesbury
22 High Street
Acton, MA 01720
(978) 263-3788

6/5/2008

May 4, 2008

Board of Selectmen
Town of Acton
472 Main Street
Acton, MA 01720
bos@acton-ma.gov

Subject: Request for approval to connect to Sewer System

Dear Board of Selectmen,

As abutters to the parcel of land owned by Mr. James Fenton on High Street near Erikson's Grain Mill, we have followed closely and participated in many of the town proceedings which occurred three years ago relating to the Faulkner Mills project proposed at the time. Now that work has started anew we would like to reopen a request we originally made to the Board of Selectmen in early 2005.

As such, the purpose of this letter is to formally request the Board's approval to allow us to connect to the town sewer system through Mr. Fenton's project. We had been in contact with Mr. Fenton three years ago regarding this possibility and again last month on this matter; he continues to be very supportive of working with us. We have also been in contact with the Board of Health and have received some encouragement regarding the feasibility of our proposal.

If the Board grants us this privilege, we would also like to ask the Board's support in allowing us to pay the one time \$12,311 betterment fee over the remaining number of years other Acton residences already connected to the system have been afforded. While we have not yet obtained detailed construction quotes to bring a connecting pipe to our property underneath the sidewalk currently under construction, Mr. Fenton has suggested the cost could be in the range of \$20-25 thousand. It is our understanding that the cost of installing this pipe would be paid by us and potentially two other residences that could be served by this connection, but it would not be paid by the town. Therefore, gaining the Board's support to allow us to pay the betterment fee over time would make a very big difference to us.

As the sidewalk construction phase is expected to resume within the next month, we are ready to respond to any questions and additional information the Board may request to help enable an expeditious decision to this request.

Sincerely,

A. William & Debra S. Alesbury

6/5/2008